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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Rate Regulation

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MM Docket 92-266

PETITION FOR RECONSIDERATION OF THE COMMUNITY
ANTENNA TELEVISION ASSOCIATION, INC.

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SUMMARY

CATA urges the Commission to amend its regulations in this docket. It must relieve the burdens on smaller systems, and revise its benchmark program to provide a more reasoned regulatory approach for all systems. Specifically, CATA

CATA stresses that unless these and other changes are made, the Commission and the industry will become enmired in regulation that ultimately serves no useful purpose. Along the way, industry growth will be delayed, subscribers will be disadvantaged, and smaller systems will be forced out of business. These cannot be the consequences intended by the Congress when it determined that the Commission should regulate the rates charged by cable systems.

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PETITION FOR RECONSIDERATION

1. The Community Antenna Television Association, Inc., ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. On behalf of its members who are directly affected by the Commission's action, CATA requests that the Commission reconsider certain of the regulations adopted in this docket.

INTRODUCTION

2. The Commission's effort to comply with the dictates of the Cable Act of 1992 has been impressive. By its own count, the Commission will have soon completed 32 formal actions designed to implement the various elements of the new law. But given the short time the Commission has had and the complexity of its task,

it is inevitable that pieces of the new regulatory scheme have been painted with a broad brush, and that the consequences of some of the Commission's actions have not been anticipated. This surely is the case with this Docket.

3. CATA has chosen two primary subjects to discuss - the effect of the Commission's regulations on small cable systems, and the basis of the benchmark system. We believe that the Commission could have and still should grant exemptions for cable systems with 1000 subscribers or less. Nothing in the long history of the Cable Act suggests that Congress was motivated to legislate based on the rates charged by such systems. Little in the record of the Commission proceeding supports the notion that the public interest would be served by having these small systems

think the effects of its regulations.

SMALL SYSTEMS

5. The effect of the Commission's rate regulations on small cable systems is inequitable, and the task of coping with the regulations is beyond their resources. Since the release of the Report and Order in this Docket, CATA has received hundreds of telephone calls from systems with 1000 or fewer subscribers. These systems are attempting to cope as best they can, but their distress is palpable. For the most part, they are unrepresented by counsel and do not employ firms of accountants. Many of these systems serve rural or poor communities. They do not profit maximize because they know that their subscribers - often their neighbors - have limited resources. In many cases they are relieved to discover they are below the Commission's benchmark and then dismayed to learn that the imposition of a price cap forces them to remain there even though they may not have increased their rates in several years. Faced with some 50 pages of instructions, forms and worksheets, many smaller systems have questioned whether it is worth continuing to provide service in their communities. CATA has urged these systems to contact the Commission and provide much needed information about the difficulties facing smaller cable television systems. Many of them already have made their concerns known.

6. Cable Act Provisions. The Cable Act requires the Commission to prescribe policies and regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers. Unfortunately, the Commission's response has been only to presume that its sliding scale for benchmarks adequately represents reasonable pricing for smaller systems because number of subscribers is a component, and to give franchising authorities the discretion to exempt such systems from having to file an initial rate schedule upon initiation of local regulation. These attempts by the Commission to comply with the statutory mandate to provide relief to systems with fewer than 1000 subscribers have not been adequate.

7. Benchmarks Do Not Provide For Small System Growth. Even though the Commission claims to recognize the "unique" characteristics of smaller systems, and admits that systems with small revenue bases may have difficulty absorbing cost increases over time, its benchmarks distinguish the per channel prices of large and small systems only by pennies. This approach ignores the problem of how smaller systems are to generate the revenues to finance re-building. Although this is a problem shared by all systems, regardless of size, it is particularly acute for smaller systems. These systems will be among the first forced to re-build in order to make use of the new technologies that will enable them to compete with other video distribution systems such as DBS. To the extent that the benchmarks do not permit the

recovery of revenues sufficient to finance re-building (and we know that recovery of capital costs was not a factor in the Commission's development of its benchmarks), smaller systems will not be able to meet the challenge of the new technologies. The real losers, of course, will be the subscribers to these systems.

8. Small Systems Lack Alternative Revenue Sources. The Commission should realize also that in addition to the fact that its benchmarks do not adequately reflect small system costs, these systems do not have some of the other revenue streams enjoyed by larger systems. Generally, in the smaller communities, pay penetration is lower, and, because of the small size of the systems, there are fewer pay channels. Moreover, local advertizing insertions are virtually unknown on such small systems. Although in its comments to the Notice of Proposed Rule Making in this proceeding CATA urged the Commission to take these factors into account in the development of its benchmarks, the Commission chose not to do so, instead treating the smaller systems like other, more sophisticated cable operations.

9. Commission Can Exempt Small Systems Now. CATA believes that the Commission has the authority now to exempt systems with fewer than 1000 subscribers from the burdens of rate regulation. The Congressional desire to reduce administrative burdens and cost of compliance on such systems should be administered with the greatest flexibility possible. Although the Commission has a

responsibility to ensure that subscribers to all systems be protected from unreasonable rates, it is entitled to make certain presumptions based on the unique character of the class of systems with fewer than 1000 subscribers. Moreover, neither the Congress nor the Commission has any evidence that systems with fewer than 1000 subscribers have taken undue advantage of their market position. Such systems are creatures of their communities, particularly sensitive to the ability of subscribers to pay for cable service. Many of these systems are family businesses that have served their communities for more than 30 years. The good will engendered over such a period has not been as a result of predatory pricing, but rather service. Relieving systems with fewer than 1000 subscribers from the complexities and constraints associated with the Commission's rate regulations is a reasonable response to the Congressional desire to alleviate their burdens.

10. Alternatives To Exemption. Should the Commission determine that it does not have authority to exempt systems with fewer than 1000 subscribers from its rate regulations, it should still take steps short of complete exemption to relieve the regulatory burdens on such systems. It should be emphasized that the proposals CATA is about to make could well apply to all systems, regardless of size. Many of the inequities of the present rate regulation scheme do not fall only on smaller systems. We believe, however, that these systems are at

particular risk and are particularly ill-equipped to cope with the Commission's rules.

11. Examine System Profits. First, as CATA believes the Commission should take the simplest approach possible. If the Commission is bound to regulate smaller systems, it should do so with flexibility and without the administrative horrors of FCC Form 393. Perhaps the simplest approach for the Commission and smaller systems both, would be for the regulating authority to look only at the system's profit. Systems with fewer than 1000 subscribers tend to have relatively straightforward accounts. The Commission could determine some range of profit that could satisfy it that the system's rates were reasonable, while at the same time leaving the system with the ability to generate sufficient income to re-build or add services. Any simple system of demonstrating profit and loss would be preferable to calculating benchmarks. Assuming a system were beyond some reasonable range of profit, the Commission could then require the system to meet a benchmark. Such an approach is entirely

benchmarks themselves) the Commission could permit the smaller

14. Eliminate The Price Caps. There are lesser steps the Commission might take to ameliorate the impact of its rate regulations on smaller systems. Certainly, it can eliminate the price cap. As noted above, many smaller systems charge rates well below the present benchmark level and have not raised their rates in some years. These systems should, at least, be permitted to come up to their benchmark. Thereafter, even if price caps are used, a more flexible cap could be applied to the smaller systems.

15. Re-building Costs Should Be Pass-throughs. The Commission also has the flexibility within its present regulatory scheme of permitting the smaller systems to pass through to subscribers as external costs, those costs associated with construction or re-building. Combined with CATA's suggestion that these systems be allowed to charge benchmark prices, this approach would give the systems some opportunity to plan for much needed expansion and the provision of new services not now available to their subscribers. Again, the Commission can adopt this policy if it chooses. Nothing in the Cable Act prevents it. Neither of these approaches begins to solve the problem of the administrative complexity of dealing with the benchmark system and the Commission's forms, but at least some relief from some of the most onerous effects of the regulations would be provided.

THE COMMISSION'S BENCHMARK SYSTEM

16. In response to the Notice in this proceeding, commenters, including CATA, were virtually unanimous that a benchmark system would represent a fair, nationally uniform and flexible method of regulating the rates of cable television systems. However, the benchmark process adopted by the

Commission falls short of the mark. CATA is aware that the

rates. The Commission has distinguished between satellite delivered channels and others, but it has not attempted to place different values on these channels. Thus the Commission has

Recognizing this problem, during the rate freeze the Commission has permitted systems to re-structure their tiers. Systems with a low cost basic service and a higher cost upper tier may adjust their tier charges, raising the basic tier charge and lowering the upper tier charge. The amount paid by a subscriber to both tiers will not change. Only less affluent subscribers who, perhaps, could only afford the low-cost basic service are disadvantaged, as well as local broadcasters whose stations may not be watched if some people now cannot afford basic service. What conceivable public purpose can be served by such a process?

20. In paragraph 197 of the Report and Order in this proceeding, the Commission considered this problem and rejected a mandated low price basic tier because it thought such a scheme would create a disincentive for the cable operator to put anything other than broadcast stations on the basic tier. But the Commission misses the point. Many systems already have phases, partly for marketing purposes and partly based on the

raises its basic charges and lowers its upper tier charges, it will suffer a considerable loss of revenue. That the Commission has permitted re-structuring of tiers (accompanied by the attendant notices to subscribers and franchising authorities) is not an answer. The Commission should amend its rules to permit, if not encourage, systems to offer low-cost basic service without penalty.

21. Cost-of-service Rules Needed Before Implementation Of Rate Regulation. As the Commission is well aware, it designed its benchmark system based on prices charged by cable systems of various sizes. The Commission has admitted that it did not possess, or in the construction of the sample chosen to determine the benchmarks, even request, information concerning costs or profits. The result, of course, is a series of benchmark figures that presume profitability and presume that a system will be able to add service or re-build. Another characterization of the benchmarks is that they ignore profitability and ignore the necessity of including revenues for re-building. Recognizing this problem the Commission has promised that it will adopt cost-of-service regulations. But until such regulations are adopted and their impact analyzed, systems will have no idea whether to suffer the benchmark system or attempt a cost-of-service showing. Since in the latter case the Commission has warned that the regulating authority may determine to set a rate below the benchmark, cable systems are at considerable risk. Clearly, the

Commission must enact cost-of-service regulations before rate regulation becomes effective. At the present time, the Commission is only half finished.

22. Even when cost-of-service regulations are considered, the Commission should recall that it rejected such a mechanism as the primary means of rate regulation because it would be lengthy and expensive. This will certainly be the case for smaller systems. In order to use cost-of-service regulations as a safety net therefore, the Commission must revise its benchmarks so that cost-of-service showings will not be necessary in most cases. This can only be accomplished by a revision of the process used to determine the benchmarks.

23. Benchmarks Must Reflect Costs And Profits. The benchmarks must attempt to take into account costs and profits. Congress has mandated that the Commission consider these factors. In its development of the benchmarks the Commission has ignored them. In fact, it is clear from the Commission's own explanation of how it proceeded that it can have no idea whether, and under what circumstances, cable systems are profitable. The entire thrust of the benchmark process has been to approximate rates charged by competitive systems. Yet this is only one of the factors the Commission is supposed to consider, and, it must be emphasized, merely taken into account. Congress gave the Commission considerable flexibility to develop a rate structure.

Using rates charged by competitive systems as a reference point is certainly indicated by the Act. Using these rates as the only factor is not.

24. Commission Analysis Did Not Adequately Explain Pricing.

As the Commission has noted, number of subscribers, number of channels and number of satellite channels only explain 60 percent of the variation in per channel pricing. Perhaps for an econometrician such a correlation produces satisfaction. The rest of us must suppose that either the factors that determine price are not well understood, or that had the Commission chosen a better sample it might have uncovered other determinants of pricing, or that the relationship between the factors is more complex than anticipated. The business community, not fettered by econometrics, has long known other factors that determine cable prices - debt, cost of capital, re-building, technical sophistication of plant, population density, miles of underground plant etc. The Commission found several of these factors, population density and miles of underground plant, to be "not statistically significant or not consistently so." One hesitates to argue merely that these results are counter-intuitive. Yet given the fact that the factors relied upon by the Commission explain only 60 percent of the price variation among systems, it is fair to pay heed to intuition and question not only the Commission's sample, but the assumptions upon which it is based.

25. Commission's Sample Was Skewed. The Commission's "sample" was a sample only in part. It chose as many cases as it could find of systems serving franchises where "effective competition" was occurring, and it chose 100 of the largest cable systems. Obviously, the choice of competitive systems was necessary as a reference. The choice of 100 of the largest systems was unjustified and skewed the sample. The largest systems tend to have the greatest expenses, the heaviest debt, and almost always take longer to become profitable. But since none of these factors were considered, and only their prices - bound under the circumstances to be higher than those of many smaller systems - were examined, the final result must be questioned. What would the Commission's conclusions have been if instead of the 100 largest systems, it had examined the rates of the 100 smallest systems? Many of these systems charge rates well under the Commission's benchmark. Surely, a separate set of benchmarks might have been assigned the smaller systems had the Commission included them in its sample.

26. Commission Ignored Realities Of Competitive Pricing. Since the Commission's primary goal was to compare the rates charged by competitive and non-competitive systems, it becomes critical to analyze competitive system rates. The Commission, itself, admits that, although prices charged by competitive systems might be the result of price wars, it assumed equilibrium prices. Why in a situation where there are very few instances of

competition at all, would one presume equilibrium prices. CATA is unaware of any basis for this assumption. Indeed, in the June 11, 1993, Petition for Stay filed by the Coalition of Small System Operators, an analysis by William Shew Director of Economic Studies, Arthur Andersen Economic Consulting, shows that had the Commission looked at its sample of smaller competitive systems more closely, it would have found that where prices were in equilibrium - after the price war stage, about five years - there was little difference in prices between competitive and non-competitive systems.

27. Municipally Owned Systems Are Subsidized And Should Be Eliminated From The Commission's Sample. Some of the systems included in the sample of competitive systems are municipally owned. Such systems are often heavily subsidized by government, are not profitable, and force their competitors to charge accordingly. Such a situation exists in Paragould, Arkansas. The City of Paragould announced in August, 1992, that it is raising real and personal property taxes by \$328,000 to subsidize its cable system's losses. As a result even non-subscribing residents are forced to subsidize the city system. Without this subsidy the monthly cable rate would be \$8.33 higher. The building of the system was financed in 1989 by the issuance of \$3.22 million in capital improvement bonds. This is the kind of competition faced by the privately owned system also serving Paragould. It is hardly realistic to base rates charged by non-

competitive systems on such situations. In a similar situation, the municipally owned system in Elbow Lake, Minnesota, was financed at an initial capital cost of \$350,000, has continually lost money and is heavily subsidized. Indeed, it is probably the case that at one point or another, every municipally owned system has been subsidized, and any competitor of such a system has had to charge artificially low prices in order to survive. Systems


CONCLUSION

29. For the reasons explained above, CATA urges the Commission to reconsider its action in this docket and amend its regulations accordingly.

Respectfully submitted,

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